Supreme Court, U.S.
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No. (1)

In The
Supreme Court of the United States

JOHN ARTER NARRON, III,
Petitioner,

v.

STATE OF NORTH CAROLINA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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Dated: May 5, 2009

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QUESTION PRESENTED

The Question Presented is:

> DOES THE STATUTORY LANGUAGE "THE RESULTS OF A CHEMICAL ANALYSIS SHALL BE DEEMED SUFFICIENT EVIDENCE OF A PERSON'S ALCOHOL CONCENTRATION" CONSTITUTE A MANDATORY PRESUMPTION VIOLATIVE OF A PERSON'S DUE PROCESS RIGHTS SECURED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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PETITION FOR WRIT OF CERTIORARI

NOW COMES John Arter Narron, III, Petitioner herein, and requests that this Court issue a Writ of Certiorari to the Court of Appeals of North Carolina to review its decision filed on October 7, 2008, affirming Petitioner's conviction and finding the language of newly amended N.C. GEN. STAT. § 20-138.1 constitutional.

OPINIONS BELOW

On October 7, 2008, the North Carolina Court of Appeals issued an opinion finding no error in Narron's trial, and no constitutional infirmity in N.C. GEN. STAT. § 20-138.1 (2007). The opinion is published as *State v. Narron*, 666 S.E.2d 860 (N.C. App. 2008) and reprinted at Appendix page 3a. The North Carolina Supreme Court dismissed the appeal and denied discretionary review on February 5, 2009. The order is reprinted at Appendix page 1a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 and Rule 10(c) of the Supreme Court Rules. The North Carolina Supreme Court dismissed the appeal and denied discretionary review on February 5, 2009.

CONSTITUTIONAL AUTHORITY INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law,

> nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Petitioner ("Narron") was charged with Driving While Impaired in violation of N.C. GEN. STAT. § 20-138.1 (2007) on January 13, 2007, forty-four days after the amended statute became effective. The Judge in District Court found Narron guilty, and Narron appealed to Superior Court. Narron moved to dismiss the charge on the grounds that the newly-amended statute under which he was charged is unconstitutional. The trial court denied Narron's motion, and the jury convicted Narron. Narron appealed.

On October 7, 2008, the North Carolina Court of Appeals determined that there was no error in Narron's trial, and no constitutional infirmity in N.C. GEN. STAT. § 20-138.1 (2007) as amended. *State v. Narron*, 666 S.E.2d 860 (N.C. App. 2008), App. page 3a. The North Carolina Supreme Court denied review on February 5, 2009, App. page 1a.

STATEMENT OF THE FACTS

During the early morning hours of January 13, 2007, in Greenville, North Carolina, Officer Wes Terry of the Greenville Police Department ("Officer Terry") observed a vehicle parked in the travel lane of a public one-way street downtown. Officer Terry approached the vehicle, found Petitioner to be the operator, and requested his driver license.

Petitioner produced his license and explained he was waiting there to pick someone up from the business beside the location where he was stopped. Officer Terry noticed Petitioner had red, glassy eyes and a strong odor of alcohol coming from his breath. Complying with Officer Terry's request, Petitioner exited the vehicle and had a brief conversation with Officer Terry, during which time Officer Terry noticed Petitioner's speech to be clear.

At Officer Terry's request, after two or three minutes of standing on the sidewalk beside the vehicle, Petitioner sat back in the vehicle. After approximately five more minutes, Corporal Montanye of the Greenville Police Department Traffic Safety Unit ("Corporal Montanye") arrived at Officer Terry's request. Complying with Corporal Montanye's request, Petitioner again exited the vehicle and walked with Corporal Montanye to a patrol car and sat in the passenger seat. Corporal Montanye noticed a moderate odor of alcohol and observed Petitioner to have glassy eyes.

While in Corporal Montanye's patrol car, Petitioner stated that he drank three beers earlier, was there waiting to pick up a friend, and was talkative. Corporal Montanye requested Petitioner to submit to two field alcohol tests, which Petitioner did as instructed. After the second field test yielded a positive result for alcohol, Corporal Montanye arrested Petitioner for driving while impaired and transported him to the Pitt County Detention Center.

At the Detention Center, Corporal Montanye complied with all procedures regarding chemical testing and requested Petitioner to submit two breath samples on the Intoxilyzer 5000 machine. Petitioner submitted two breath samples as instructed, and the machine printed a ticket which read "Reported AC: 0.08." Corporal Montanye never requested Petitioner to perform any physical field sobriety tests, and during his contact with Petitioner he noticed nothing abnormal or unusual about Petitioner's speech, balance, or coordination.

Corporal Montanye testified at trial that he has been a chemical analyst for over ten years, and during that time period, the only changes to the machine have been to the printer and keyboard. Corporal Montanye confirmed that the calibration check itself has a tolerance range of .019, and the two breath samples have, by statute, an accepted variance range of .029 relative to each other. Preventive Maintenance records on the specific machine utilized for Petitioner's testing also showed that, although maintenance was performed on this machine, and although the analysts certify that maintenance and simulator solution change is occurring every four months, there was a gap of eight months the previous year. During that eight month gap, Officer Montanye admitted, there is no account for the location, servicing, or simulator solution status of the machine.

Counsel for Petitioner argued this variance and 25% range of permissible error to the jury, but the jury was instructed, over Petitioner's objection, that "the results of a chemical analysis are deemed

sufficient evidence of a person's alcohol concentration." This language was taken verbatim from the newly-added language in the charging statute, effective just forty-four days prior to Petitioner's arrest.

Petitioner had previously moved to dismiss the charge on the basis that the new additional language to the statute violates the Due Process Clause of the United States Constitution applied to the States through the Fourteenth Amendment. The trial court denied Petitioner's motion in an order dated August 9, 2007. Appendix page 24a. At trial, Petitioner renewed that motion at the close of evidence, objected to the statutory language being instructed to the jury on the basis it forces the jury to find the element of alcohol concentration to be exactly equal to the machine's result offered by the prosecution. The trial court denied Petitioner's motion, overruled Petitioner's objection to the jury instruction, and the jury found Petitioner guilty. The trial court entered a judgment against Petitioner for a conviction of driving while impaired. Appendix page 20a.

The North Carolina Court of Appeals found the statutory language constitutional, affirmed the conviction, and the North Carolina Supreme Court denied discretionary review. *State v. Narron*, 666 S.E.2d 860 (N.C. App. 2008), *discretionary review denied*, ---N.C.---(2009), Appendix page 1a.

REASONS WHY THE WRIT SHOULD ISSUE

In periodic, graduated responses to public concern for tougher driving while impaired laws, the legislatures of all fifty states have passed "per se" laws, requiring only that the prosecution prove a particular alcohol concentration rather than show any evidence of physical or mental impairment. This is inarguably within the sovereign power of a state assembly to so sanction. North Carolina has had a per se driving while impaired offense since 1984, amending its elemental structure only once in 1993 to lower the numerical alcohol concentration element from 0.10 to 0.08.

Until December 1, 2006, North Carolina's driving while impaired statute read, in pertinent part, as follows:

> (a) Offense.-A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State: (1) While under the influence of an impairing substance; or (2) After having consumed sufficient alcohol that he has, at any relevant time after driving, an alcohol concentration of 0.08 or more.

N.C. GEN. STAT. § 20-138.1 (2006). In 2005, the "Governor's DWI Task-Force" recommended numerous changes, including additional language to

cure the problem that "some drivers who register 0.08 by a chemical analysis are not being convicted." *Consideration of H.B. 1048 Before The House Judiciary I Committee*, Leg. Box 47 (April 5, 2005). In 2006, the new driving while impaired statute was introduced in the North Carolina House of Representatives as "The Governor's DWI Task Force Recommendations," which was passed the same year and effective for all offenses alleged to have been committed on or after December 1, 2006. With the new amendment, the elements of the offense in sub (a) remain the same, but the following language was added to the end of (a)(2):

> The results of a chemical analysis shall be deemed sufficient evidence of a person's alcohol concentration.

N.C. GEN. STAT. § 20-138.1 (2007).

The North Carolina General Assembly's attempt to cure the perceived ill of some criminal defendants not actually getting convicted of the offense with which they are charged did not follow any other state's lead. A review of all forty-nine other states' driving while impaired, driving under the influence, and driving while intoxicated laws reveals that, while a few have presumptions of validity and others utilize prima facie or permissive inference language in their per se laws, none have statutes cast, as North Carolina's, in the language of command.

The scientific evidence offered by the prosecution, whether a blood test affidavit or the printed results from a mechanical breath test, have always served as the state's evidence of the actual alcohol concentration in the accused. This evidence, as with all other evidence and as mandated by due process, was always subject to probative inquiry by the factfinder and the gravity of its import could be effected by independent evidence presented by the accused, or---as was attempted in the present case--- the revelation of inaccuracies and broad range of error in the scientific method utilized by the prosecution. Before North Carolina added the presumptive language to its per se statute, this remained, as with all other elements of the offense, a question of fact for the jury. After the amendment, the prosecution need only prove the result of their test showed a 0.08 or above, and the jury is only necessary, as the counsel for Respondent argued at the trial level, "to prove the other elements" because "the Intoxilyzer result is the element."

This Court has consistently held that Due Process requires, in every criminal case, the prosecution to bear the burden of proving every fact necessary to prove every element of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). This "bedrock, axiomatic and elementary principle prohibits the State from using evidentiary presumptions that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." *Francis v. Franklin*, 471 U.S. 307, 313 (1985). The effect of the new language of N.C. GEN. STAT. § 20-138.1(a)(2) is to mandate that the jury

find the element of alcohol concentration to be exactly what the state's evidence shows, without any deliberation thereon.

This Court has found language very similar to the statutory language at issue in the present case to be an unconstitutional mandatory presumption in the following cases: *Tot v. United States*, 319 U.S. 463 (1943)("possession of a firearm by such person shall be presumptive evidence that such firearm was shipped . . . in violation of this act"); *United States v. Romano*, 382 U.S. 136 (1965)("presence shall be deemed sufficient evidence to authorize conviction"); *Leary v. United States*, 395 U.S. 6 (1969)("possession shall be deemed sufficient evidence to authorize conviction"). These cases were all decided under the less rigid rational connection test, which determined merely whether the predicate fact, or fact proven at trial, had a rational connection, in the run of cases, to the presumed fact.

The rational connection test was utilized by this Court until *County Court of Ulster v. Allen*, 442 U.S. 140 (1979) and *Sandstrom v. Montana*, 442 U.S. 510 (1979). In *Allen*, this Court differentiated between mere permissive inferences and mandatory presumptions, calling them a "far more troublesome device" because they "tell the trier of fact that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant comes forth with some evidence to rebut the presumed connection between the two facts." *Allen* at 157.

Accordingly, in both *Allen* and *Sandstrom*, *Supra*, this Court began to apply a tougher test for constitutionality of presumptions which by their plain wording are mandatory and not merely permissive. This Court held that irrebuttable mandatory presumptions are unconstitutional, and rebuttable mandatory presumptions are constitutional only if the defendant's burden required presentation of merely some evidence, and once that evidence is presented the presumption disappears. If both requirements are met, the rational connection test is then applied to determine whether or not the rebuttable presumption is constitutional. The test applied by this Court in *Allen* was followed and applied by North Carolina's Supreme Court in *State v. White*, 300 N.C. 494 (1980), and all following cases, making a rebuttable provision often dispositive to North Carolina courts' review of a statute or jury instruction.

This Court, however, applied an even stricter test and placed the rebuttable exception to the mandatory presumption test in doubt in *Francis v. Franklin*, 471 U.S. 307 (1985), when it analyzed the following jury instruction: "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted." This Court found that, although it was rebuttable, the instruction was constitutionally infirm, holding that a "mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but it is no less unconstitutional." *Francis* at 317.

In passing on the constitutionality of the new language of N.C. GEN. STAT. § 20-138.1, the North Carolina Court of Appeals followed its previous holding in *State v. Phillips*, 127 N.C. App. 391 (1997) and the North Carolina Supreme Court's holding in *State v. Shuping*, 312 N.C. 421 (1984). Both cases, however, were reviews of the trial court's denial of the defendant's motion to dismiss at the close of the state's evidence. In both cases, the prosecution had presented into evidence a valid chemical test as evidence of the defendant's alcohol concentration. In both cases, the courts correctly held that, in the light most favorable to the state, this was sufficient to be presented to the jury for consideration. The Court of Appeals failed to see the obvious difference between the standard in these holdings and the burden of proof beyond a reasonable doubt, which the presumption in Petitioner's case effectively removed from the prosecution.

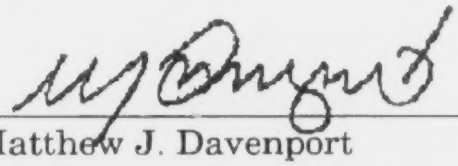
The language the North Carolina General Assembly added to N.C. GEN. STAT. § 20-138.1(a)(2) constitutes only one sentence, but it has the effect of removing the factfinder from one entire element of impaired driving. Effectively, because of this presumption, the element of alcohol concentration is already proven as soon as the defendant blows into the machine or submits to a blood test. A criminal defendant facing prosecution for driving while impaired in North Carolina is now met with the burden of disproving the state's scientific evidence which the trial court, as in Petitioner's case, will instruct the jury is "deemed sufficient evidence" of the element. This evidence, like a radar reading in a speeding case or a weight scale in a drug trafficking

case, is a tool used to prove an element, and it must remain a question of fact as due process mandates. The prosecution must bear the burden of proving that its evidence proves the element of alcohol concentration beyond a reasonable doubt, and whether that evidence is reliable or accurate enough to meet that burden must remain within the province of the jury.

CONCLUSION

Narron respectfully requests that this Court grant review to determine if the language of N.C. GEN. STAT. § 20-138.1(a)(2) constitutes an unconstitutional mandatory presumption that violates a defendant's due process rights secured by the Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted this the 5th day of May, 2009.



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APPENDIX

No. 505P08 THREE-A DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(State v John Arter Narron, III)

STATE OF NORTH CAROLINA
v
JOHN ARTER NARRON, III

From NC Court of Appeals
(08-129)
From Pitt
(07CRS50348)

****

ORDER

Upon consideration of the petition filed on the 10th day of November 2008 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> **"Denied by order of the Court in conference, this the 5th day of February 2009.**
>
> **s/ Hudson, J.**
> **For the Court"**

WITNESS my hand and the seal of the Supreme Court of North Carolina, this 11th day of February 2009.

Christie Speir Cameron
Clerk, Supreme Court of
North Carolina

/s/ Shaula A. Brannan
Shaula A. Brennan
Assistant Clerk

Copy to:
North Carolina Court of Appeals
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NO. COA08-129

NORTH CAROLINA COURT OF APPEALS

Filed: 7 October 2008

STATE OF NORTH CAROLINA

v. Pitt County
No. 07 CRS 50348

JOHN ARTER NARRON, III

Appeal by Defendant from judgment entered 16 October 2007 by Judge Kenneth F. Crow in Pitt County Superior Court. Heard in the Court of Appeals 20 August 2008.

Attorney General Roy Cooper, by Special Counsel Isaac T. Avery, III, and Assistant Attorney Generals Kathryne E. Hathcock and Christopher W. Brooks, for the State.

The Law Office of Matthew J. Davenport, P.A., by Matthew J. Davenport, for Defendant.

ARROWOOD, Judge.

John Narron, III (Defendant) appeals from judgment entered upon his conviction of impaired driving, in violation of N.C. Gen. Stat. § 20-138.1. We affirm.

Defendant was arrested on 13 January 2007 in Greenville, North Carolina, and charged with impaired driving. He was convicted in Pitt County

District Court and appealed to Superior Court for trial *de novo*. On 5 February 2007 Defendant filed a motion to dismiss the charge of impaired driving, on the grounds that N.C. Gen. Stat. § 20-138.1 violated the North Carolina and U.S. Constitutions. He specifically challenged the statute's provision addressing chemical analysis as evidence of a defendant's blood alcohol concentration. On 10 August 2007 Judge Clifton W. Everett, Jr., entered an order denying Defendant's dismissal motion.

Defendant was tried before a Pitt County jury on 15 October 2007. The State's evidence tended to show in pertinent part, the following: Officer W.O. Terry of the Greenville, North Carolina, Police Department testified that, while on patrol in the early morning hours of 13 January 2007, he saw Defendant in the driver's seat of a motor vehicle that was stopped "in the middle of the travel lane" on the left side of a downtown street. Terry approached Defendant and noticed that Defendant's eyes were red and glassy and that he had an odor of alcohol. Terry summoned a traffic safety officer and about five minutes later Greenville Police Department Corporal Michael Montanye arrived at the scene.

Officer Montanye testified that at 1:30 a.m. on 13 January 2007 he was on duty as a traffic safety officer in Greenville. In response to Terry's call, Montanye drove to Cotanche Street, where he saw the Defendant in a vehicle "stopped in the left travel lane." Defendant told Montanye he had been at a party where he drank three beers. The officer observed that Defendant's eyes were glassy, that he was talkative, and that he smelled of alcohol. Officer

Montanye performed two tests on an alcosensor, a portable machine that measures alcohol in a person's breath. When both tests showed a positive result for the presence of alcohol, Montanye placed defendant under arrest and took him to the Pitt County Detention center. There he administered an Intoxylizer test which showed an alcohol concentration of 0.08.

Defendant did not present evidence at trial. After the presentation of evidence, the trial court submitted the case to the jury. Defendant moved for a special jury instruction regarding proof of the Defendant's blood alcohol concentration; his motion was denied. The jury found Defendant guilty of impaired driving, and the court entered judgment accordingly. From this judgment and conviction, Defendant appeals.

Standard of Review

Defendant argues that the statute under which he was convicted is unconstitutional. "[T]he judicial duty of passing upon the constitutionality of an act of the General Assembly is one of great gravity and delicacy. This Court presumes that any act promulgated by the General Assembly is constitutional and resolves all doubt in favor of its constitutionality." *Guilford Co. Bd. of Education v. Guilford Co. Bd. of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993) (citing *Greensboro v. Wall*, 247 N.C. 516, 101 S.E.2d 413 (1958)) (other citations omitted). "In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld

unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." *Guilford Cty. Bd. of Educ.*, 110 N.C. App. at 511, 430 S.E.2d at 684-85 (citing *Baker v. Martin*, 330 N.C. 331, 411 S.E.2d 143 (1991)) (other citation omitted). Moreover:

> A well recognized rule in this State is that, where a statute is susceptible to two interpretations – one constitutional and one unconstitutional – the Court should adopt the interpretation resulting in a finding of constitutionality.

In re Banks, 295 N.C. 236, 239, 244 S.E.2d 386, 388 (1978) (citations omitted).

Defendant argues that certain language in N.C. Gen. Stat. § 20-138.1(a)(2) (2007) renders the statute unconstitutional. N.C. Gen. Stat. § 20-138.1 provides in pertinent part that:

> (a) A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or

> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration[.]

Defendant contends that the provision that "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" in N.C. Gen. Stat. § 20-138.1(a)(2) "constitutes a mandatory presumption violative of his right to due process secured by the Fifth and Fourteenth Amendments to the U.S. Constitution." We disagree.

Defendant asserts a violation of the "principles of due process of law which require the State to prove beyond a reasonable doubt every essential element of the crime charged and which preclude placing upon a defendant any burden to prove the nonexistence of any such element." *State v. White*, 300 N.C. 494, 499, 268 S.E.2d 481, 485 (1980) (citing *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508 (1975)). "The three essential elements of the offense of impaired driving are (1) driving a vehicle (2) upon any public vehicular area (3) while under the influence of an impairing substance or '[a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an

alcohol concentration of [0.08] or more.' N.C.G.S. § 20-138.1 [(2007)]". *State v. Denning*, 316 N.C. 523, 524, 342 S.E.2d 855, 856-57 (1986).

Thus, "there are two ways to prove the single offense of impaired driving: (1) showing appreciable impairment; or (2) showing an alcohol concentration of 0.08 or more." *State v. McDonald*, 151 N.C. App. 236, 244, 565 S.E.2d 273, 277 (2002) (citing *State v. Coker*, 312 N.C. 432, 440, 323 S.E.2d 343, 349 (1984)). The present appeal concerns proof of impairment by showing an alcohol concentration of .08 or more. N.C. Gen. Stat. § 20-4.01(1b) (2007), defines "alcohol concentration" as "[t]he concentration of alcohol in a person, expressed either as: a. Grams of alcohol per 100 milliliters of blood; or b. Grams of alcohol per 210 liters of breath." N.C. Gen. Stat. § 20-4.01(3a) (2007) defines "chemical analysis" in relevant part as "[a] test or tests of the breath [or] blood . . . of a person to determine the person's alcohol concentration or presence of an impairing substance, performed in accordance with G.S. 20-139.1, including duplicate or sequential analyses."

In the instant case, the chemical analysis was performed on an Intoxilyzer 5000 machine, which showed Defendant's blood alcohol concentration to be eight one-hundredths grams of alcohol per 210 liters of breath (.08). "The Intoxilyzer is a breath-testing instrument approved for use by the North Carolina [Department of Health and Human Services (DHHS).] Pursuant to N.C. Gen. Stat. § 20-139.1 [(2007)], [DHHS] has adopted procedures for the use of this instrument which are codified at [10A

N.C.A.C. 41B.0320 and 41B.0321 (December 2007)]." Machines such as the Intoxilyzer 5000 have been used for decades to measure blood alcohol concentration by chemical analysis of an individual's breath. *See, e.g., State v. Powell*, 264 N.C. 73, 140 S.E.2d 705, (1965) (upholding admission of Breathalyzer results). Appellate cases have noted the general reliability of this chemical analysis, observing as early as 1984 that "the science of breath analysis for alcohol concentration has become increasingly reliable . . . and increasingly accepted as a means for measuring blood alcohol concentration." *State v. Smith*, 312 N.C. 361, 372, 323 S.E.2d 316, 322 (1984). *Smith* expressly associated the reliability of chemical analysis with the provisions of N.C. Gen. Stat. § 20-138.1:

> [S]cientific and technological advancements which have made possible this type of analysis have removed the necessity for a subjective determination of impairment[.] . . . Indeed, our legislature's recognition of this reliable and accurate innovation of blood alcohol concentration testing is manifested in N.C.G.S. § 20-138.1(a)(2) which now provides that a person who "after having consumed sufficient alcohol that he has, at any relevant time after driving, an alcohol concentration of [0.08] or more", commits the offense of impaired driving.

Id. at 373, 323 S.E.2d at 323.

However, under N.C. Gen. Stat. §§ 20-138.1 and 139.1, statutory criteria must be met before results of a chemical analysis are admissible in court. The defendant may challenge the admissibility of a chemical analysis of his blood alcohol level. N.C. Gen. Stat. § 139.1 (2007) provides in relevant part that:

> (a) In any implied-consent offense under G.S. 20-16.2, a person's alcohol concentration . . . as shown by a chemical analysis is admissible in evidence. This section does not limit the introduction of other competent evidence as to a person's alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests.
>
> (b) The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration. A chemical analysis of the breath administered pursuant to the implied-consent law is admissible in any . . . proceeding if . . .
>
> (1) It is performed in accordance with the rules of the Department of Health and Human Services.

> (2) The person performing the analysis had . . . a current permit . . .

N.C. Gen. Stat. § 20-138.1 states:

> (a1) A person who has submitted to a chemical analysis of a blood sample, pursuant to G.S. 20-139.1(d), may use the result in rebuttal as evidence that the person did not have, at a relevant time after driving, an alcohol concentration of 0.08 or more.
>
> . . . .
>
> (b1) Nothing in this section shall preclude a person from asserting that a chemical analysis result is inadmissible pursuant to G.S. 20-139.1(b2).

In addition to technical challenges set out in the statutes, a defendant presumably could impeach the admissibility, credibility, or weight of the results of chemical analysis in traditional ways.

As a corollary of the accepted reliability of chemical analysis, and of and the presence of statutory standards for their admissibility, the longstanding common law rule is that results of a chemical analysis are sufficient evidence to submit the issue of a defendant's alcohol concentration to the factfinder:

> Once the trial court determined that the chemical analysis of defendant's breath was valid, then the reading constituted reliable evidence and was sufficient to satisfy the State's burden of proof under N.C. Gen. Stat. § 20-138.1(a)(2).

State v. Phillips, 127 N.C. App. 391, 394, 489 S.E.2d 890, 892 (1997) (citing *State v. Shuping*, 312 N.C. 421, 323 S.E.2d 350 (1984)). In 2006 the North Carolina General Assembly formally codified this rule by amending N.C. Gen. Stat. § 20-138.1 to state that "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration[.]" Defendant asserts that this amendment creates an impermissible presumption. We do not agree.

"A presumption of fact is defined as an inference of the existence of one fact from the existence of some other fact, or an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known." *Bryant v. Burns-Hammond Const. Co.*, 197 N.C. 639, 643, 150 S.E. 122, 124 (1929). "Inferences and presumptions are a staple of our adversary system of fact finding. It is often necessary for the trier of fact to determine the existence of an element of the crime – that is, an 'ultimate' or 'elemental' fact – from the existence of one or more 'evidentiary' or 'basic' facts." *State v. White*, 300 N.C. 494, 499-500, 268 S.E.2d 481, 485 (1980). The North Carolina Supreme Court has explained further that:

> The word presumption, as lucidly pointed out by STANSBURY, N. C. EVIDENCE § 215 (2d Ed., 1963), has been used in different senses, but always upon the premise that when a certain basic fact is established another (presumed) fact is assumed or inferred. The following situations illustrate the varying uses of the word presumption: (1) If evidence to disprove the presumed fact will not be heard, we have a rule of substantive law, sometimes loosely called "a conclusive presumption"; (2) If the basic fact authorizes, but does not compel, the jury to find the assumed facts, we have a permissible inference or *prima facie* evidence; (3) If the basic fact compels the jury to find the assumed fact unless and until sufficient evidence of its nonexistence has been introduced, we have a true presumption, and, in the absence of sufficient proof to overcome it, the jury must find according to the presumption.

State v. Cooke, 270 N.C. 644, 649, 155 S.E.2d 165, 168 (1967).

In the instant case, we are called upon to decide whether the provision that "results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" creates an unconstitutional presumption. We are concerned with the interpretation of "shall be deemed sufficient evidence to prove," as there is no

dispute about the phrases "results of a chemical analysis" or "a person's alcohol concentration." We conclude that the challenged provision does not create an evidentiary or factual presumption, but simply states the standard for *prima facie* evidence of a defendant's alcohol concentration.

"'Statutory interpretation properly begins with an examination of the plain words of the statute.' If the language of a statute is clear, then the Court must implement the statute according to the plain meaning of its terms." *State v. Crow*, 175 N.C. App. 119, 123, 623 S.E.2d 68, 71 (2005) (quoting *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). "Nontechnical statutory words are to be construed in accordance with their common and ordinary meaning." *Comr. of Insurance v. North Carolina Rate Bureau*, 54 N.C. App. 601, 605, 284 S.E.2d 339, 342 (1981) (citations omitted)).

As noted by Defendant, the word "shall" connotes that the action referred to is mandatory. "It is well established that 'the word 'shall' is generally imperative or mandatory." *Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979)). "The definition of the word 'deemed' in the legal context is 'considered' or 'treated as if.' BLACK'S LAW DICTIONARY 415 (6th ed. 1990); Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 254 (2d ed. 1995)." *Ward v. Wake Cty. Bd. of Educ.*, 166 N.C. App. 726, 731, 603 S.E.2d 896, 900 (2004) Black's Law Dictionary treats

"sufficient evidence" as synonymous with "satisfactory evidence" which it defines as "evidence that is sufficient to satisfy an unprejudiced mind seeking the truth[;] Also termed sufficient evidence." BLACK'S LAW DICTIONARY 599 (8th ed. 2004). Finally, the word "prove" means "to establish the truth of a fact or hypothesis by satisfactory evidence." BLACK'S LAW DICTIONARY 1261 (8th ed. 2004).

The phrase at issue contains no obscure or technical terms. We conclude that in the context of "results of chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" the meaning of the phrase "shall be deemed sufficient evidence to prove" is that properly admitted results of a chemical analysis "must be treated as *prima facie* evidence of" a defendant's alcohol concentration.

"In interpreting statutes, . . . it is always presumed that the Legislature acted with full knowledge of prior and existing law." *Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977). Accordingly, our conclusion is further supported by the fact that the language of the amendment is essentially the same as the established common law rule that "[o]nce it is determined that the chemical analysis of the defendant's breath was valid, then a reading of [0.08] constitutes reliable evidence and is sufficient to satisfy the State's burden of proof as to this element of the offense of DWI." *Shuping*, 312 N.C. at 431, 323 S.E.2d at 356.

We also conclude that the provision that "results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration," which we construe as a statement of the standard for *prima facie* evidence of a person's alcohol concentration, does not create a legal presumption.

As discussed above, the essential feature of a true presumption is that proof of a basic fact permits or requires the fact finder to find a different, elemental, fact. For example, "[m]alice may be presumed upon proof beyond a reasonable doubt of a killing by the intentional use of a deadly weapon, nothing else appearing." *State v. Weeks*, 322 N.C. 152, 172, 367 S.E.2d 895, 907 (1988) (citation omitted). Thus, proof beyond a reasonable doubt of the basic fact - a defendant's use of a deadly weapon to commit a killing – allows the jury to find the elemental fact – that the defendant acted with malice.

The Defendant does not articulate what he contends is the elemental fact to be "presumed" upon proof of the basic fact of the existence of a properly admitted chemical analysis of his alcohol concentration, and we conclude there is none. For example, the statute does not state that "results of a chemical analysis shall be deemed sufficient evidence to prove" e.g., a person's degree of intoxication, or his operation of a vehicle on a state highway.

The "result of a chemical analysis" is a report of a person's alcohol concentration, and the statute

provides that the result of such a test constitutes *prima facie* evidence of the defendant's alcohol concentration as reported in the results. In other words, the statute simply authorizes the jury to find that the report is what it purports to be – the results of a chemical analysis showing the defendant's alcohol concentration. This is the definition of *prima facie* evidence of an element of any criminal offense or civil cause of action - that the jury may find it adequate proof of a fact at issue. However, there is no "presumption" created with regards to some other element or factual issue. "Appellee contends that the instruction at issue here did not create a presumption, mandatory or otherwise. . . . We agree that no such presumption was established here. . . . The instruction did not state that upon finding certain predicate facts, the jury could infer that a necessary element of the [State's] case had been met." *Koonce v. Pepe*, 99 F.3d 469, 473 (1st Cir. 1996).

We conclude that the statutory amendment simply codifies the common law threshold for *prima facie* evidence of a defendant's alcohol concentration. Therefore, there was no need for the trial court to call to the jury's attention that the chemical analysis was the basis of the trial court's determination that the State had presented *prima facie* proof of the element. If a case is submitted to the jury, then by definition, the court has determined that the State presented "sufficient evidence to prove" each of the elements of the offense. However, we perceive no prejudice to the Defendant in the court's statement to the jury that "results of a chemical analysis are

deemed sufficient evidence to prove a person's alcohol concentration."

This assignment of error is overruled.

Defendant also argues that the trial court erred by denying his motion for a special jury instruction. We disagree.

> "A trial court's jury instruction 'is for the guidance of the jury.' Furthermore, the purpose 'is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict.' 'In a criminal trial the judge has the duty to instruct the jury on the law arising from all the evidence presented.' A judge has the obligation 'to instruct the jury on every substantive feature of the case.'"

State v. Smith, 360 N.C. 341, 346-47, 626 S.E.2d 258, 261 (2006) (quoting *Sugg v. Baker*, 258 N.C. 333, 335, 128 S.E.2d 595, 597 (1962); *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971); *State v. Moore*, 75 N.C. App. 543, 546, 331 S.E.2d 251, 253 (1985); and *State v. Mitchell*, 48 N.C. App. 680, 682, 270 S.E.2d 117, 118 (1980)).

> "However, '[t]he burden upon the defendant is to show more than a possibility that the jury applied the

> instruction in an unconstitutional manner.' Further, '[w]here the instructions to the jury, taken as a whole, present the law fairly and clearly to the jury, we will not find error even if isolated expressions, standing alone, might be considered erroneous.'"

State v. Freeman, 185 N.C. App. 408, 419, 648 S.E.2d 876, 884 (2007) (quoting *State v. Smith*, 360 N.C. 341, 347, 626 S.E.2d 258, 261-62 (2006); and *State v. Morgan*, 359 N.C. 131, 165, 604 S.E.2d 886, 907 (2004)).

Defendant's argument, that the trial court erred by denying his motion for a special instruction, is premised on his contention that the instruction given by the court created an impermissible presumption. As discussed above, we have rejected this argument. We conclude that the court's instructions adequately informed the jury of the law as applied to the evidence presented at trial. This assignment of error is overruled.

For the reasons discussed above, we conclude the Defendant had a fair trial, free of reversible error.

No error.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA	*File No.* 07CRS050348 51

PITT COUNTY GREENVILLE Seat of Court
In The General Court Of Justice
☒ Superior Court Division

STATE VERSUS

Name of Defendant	*Race*	*Sex*
NARRON, JOHN ARTER	W	M

Drivers License No.	*State*	*DOB*
23320545	NC	9/9/1981

IMPAIRED DRIVING – JUDGMENT SUSPENDING SENTENCE

Date of Offense	*Attorney For State*
1/13/2007	OLIVER, TONYA

Attorney For Defendant
DAVENPORT, MATT
☒ Retained

The defendant appeared in open court and
☒ was found guilty by a jury of: the offense specified above. The Court, based upon the determinations as shown on the attached Determination of Sentencing Factors form (AOC-CR-311), has imposed the following punishment level.
☒ Level Five.

The Court, having considered evidence, arguments of counsel and statement of defendant, ORDERS that defendant be imprisoned:

for a minimum term of	for a maximum term of
60 Day(s)	60 Day(s)

in the custody of the
☒ Sheriff of Pitt County.

The defendant shall be given credit for 1 days spent in confinement prior to the date of this Judgment as a result of this charge. Credit shall be applied against the
☒ minimum and maximum terms above.

SUSPENSION OF SENTENCE

Subject to the conditions set out below, the execution of this sentence is suspended and the defendant is placed on
☒ unsupervised probation for 18 months, the Court having received evidence and having found as a fact that supervision is necessary.

MONETARY CONDITIONS

The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" shown below, plus the probation supervision fee, pursuant to a schedule . . .
DUE BY FRIDAY 10-19-07

Costs	*Fine*	*Community Service Fee*
$245.50	$100.00	$200.00

Total Amount Due
$545.50

SPECIAL CONDITIONS OF PROBATION – G.S. 15A-1343(b1); 20-179

☒ 12. Surrender the defendant's drivers license to the Clerk of Superior Court for transmittal/notification to the Division of Motor Vehicles; and not operate a motor vehicle until the defendant's driving privilege is restored by that Division, except as may be permitted in a limited privilege.

☒ 13. Complete 24 hours of community service within 120 days from this date as directed by the Community Service Coordinator, and pay to the Clerk the community service fee prescribed by law pursuant to the schedule set out under "Monetary Conditions" above.

☒ 16. Other:
THE SUBSTANCE ABUSE ASSESSMENT HAS BEEN OBTAINED. DEFENDANT IS TO COMPLY WITH ANY TREATMENT REQUIREMENTS. ATTEND ADETS.

SIGNATURE OF JUDGE

Date
10/16/2007

Name of Presiding Judge (Type or Print)
KENNETH F. CROW

Signature of Presiding Judge
/s/ Kenneth F. Crow

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
PITT COUNTY	**FILE NO.: 07-CRS-50348**
STATE OF NORTH CAROLINA)	
v.)	**ORDER**
JOHN A NARRON, III) **Defendant**)	

THIS CAUSE coming on to be heard and being heard at the February 12, 2007 Session of Pitt County Superior County Superior Court before the undersigned Judge Presiding on motion of the Defendant to dismiss the charge of driving while impaired pursuant to N.C.G.S. § 20-138.1 filed against him because the statutory language of "The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" found in N.C.G.S. §§ 20-138.1(a)(2) and 20-139.1(b) is unconstitutional. This Court having considered the briefs of the parties, argument of counsel and having reviewed the cases submitted makes no findings of fact as the facts were contained in the Stipulation of Facts, signed by State and Defendant, and filed in the present case. The Court makes the following conclusions of law:

1. That, based on the Stipulations of Fact filed in the present case, Defendant is

among the class of people adversely affected by the amended language and has standing to object to its constitutionality;

2. That the specific statutory language of N.C.G.S. § 20-138.1(a)(2) and 139.1(b) "The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" does not constitute a mandatory presumption because "sufficient" is not conclusive or mandatory;

3. That the element in N.C.G.S. § 20-138.1(a)(2) is alcohol concentration, evidence of which is the admissible result of a chemical analysis, and the State carries the burden to prove the element of alcohol concentration beyond a reasonable doubt, as with all other elements;

4. That "sufficient," contained in the statutory language referenced in Paragraph Two (2) above, does not mandate or require the finder of fact to find the element of alcohol concentration exactly equal to the state's evidence;

5. That the statutory language referenced in (2) above does not constitute a mandatory presumption because the results of a chemical analysis offered by

the State may be rebutted by various means, specifically but not limited to the provisions of N.C.G.S. § 20-138.1(a1) and 139.1(d).

6. That "sufficient," referenced in (2) and (4) above, does not prevent the finder of fact from departing from the results of an admissible chemical analysis if the finder of fact believes the element of alcohol concentration has not been proven beyond a reasonable doubt.

ACCORDINGLY, the motion of the Defendant should be and the same is hereby **DENIED**.

This Order was announced in open court on June 26, 2007. The parties previously stipulated and agreed to the signing and entry of this Order out of county and out of term.

This the 9th day of August, 2007.

/s/ Clifton W. Everett, Jr.
Honorable CLIFTON W. EVERETT, JR.
Resident Superior Court Judge presiding

(2)

No. 08-1363

FILED
JUN 25 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

JOHN ARTER NARRON, III,

Petitioner,

v.

STATE OF NORTH CAROLINA ,

Respondent.

On Petition for a Writ of Certiorari to the North Carolina Court of Appeals

---

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASON WHY THE PETITION SHOULD BE DENIED

THE STATUTORY LANGUAGE OF SECTION 20-138.1 OF THE NORTH CAROLINA GENERAL STATUTES, WHICH DICTATES THAT "THE RESULTS OF A CHEMICAL ANALYSIS SHALL BE DEEMED SUFFICIENT EVIDENCE OF A PERSON'S ALCOHOL CONCENTRATION," DOES NOT CREATE AN UNCONSTITUTIONAL MANDATORY PRESUMPTION AND THE NORTH CAROLINA COURT OF APPEALS CORRECTLY REJECTED THE DEFENDANT'S CLAIM.

In his petition, Petitioner asserts that this Court should issue this petition because the opinion of the North Carolina Court of Appeals is in conflict with opinions of this Court. Here, however, the Petitioner has failed to show that the opinion of the North Carolina Court of Appeals is in any way in conflict with prior holdings of this Court. Moreover, as seen by the analysis of the Court of Appeals, the Petitioner has failed to show merit to his claims. Accordingly, this petition should be denied.

To support his position that the Court of Appeals' opinion is in conflict with opinions of this Court, the Petitioner contends that the 2006 statutory changes to North Carolina's driving while impaired laws created a statute which has an unconstitutional presumption

of fact in the prosecution of driving while impaired cases. *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979). Specifically, the Petitioner questions the constitutionality of section 20-138.1(a)(2) of the North Carolina General Statutes, which dictates that the "results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration." As seen in the Court of Appeals' opinion, this statutory amendment did not create of presumption of fact but instead codified an issue that was a matter of law. *State v. Narron*, __ N.C. App. __, 666 S.E.2d 860, 864-867, *disc. review denied*, 363 N.C. 135, 674 S.E.2d 140 (2009). Because the petition and arguments raised therein are based on the language of the statute, and not the actual jury instructions given, this response shall focus on the statute.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). This principle "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." *Francis v. Franklin*, 471 U.S. 307, 313 (1985).

"A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves

certain predicate facts." *Id.* at 314. In other words, such a presumption instructs the jury "to suppose to be true without proof" an elemental fact based upon the proof of a predicate fact. *Sandstrom v. Montana*, 442 U.S. 510, 517 (1979).

In *Sandstrom*, this Court considered whether a jury instruction in a murder prosecution amounted to an unconstitutional mandatory presumption. The petitioner contended the instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" relieved the State of its burden to prove beyond a reasonable doubt that the killing was done purposely or knowingly.

This Court in *Sandstrom* held that an unconstitutional mandatory presumption encompasses (1) an irrebuttable direction by the trial court to the jury to find an element once it is convinced of facts triggering the presumption or (2) a direction by the trial court to the jury to find an element based upon other facts if the defendant does not come forward with more than "some" evidence to rebut the presumption. *Id.* at 517. This Court found the instruction given in *Sandstrom* unconstitutional for either of two reasons: "[u]pon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and 'ordinary consequences' of defendant's action), *Sandstrom's* jurors could reasonably have concluded that they were

directed to find against defendant on the element of intent"; or the jury "could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove that he lacked the requisite mental state." *Id.* at 523-24.

A crucial point in *Sandstrom* is that the instruction permitted the jury to find an element – intent – based upon facts "insufficient" to prove intent. As this Court noted, evidence of voluntariness and ordinary consequences do not themselves prove intent. The jury was required to suppose the existence of intent based upon evidence of other facts.

Other cases decided by this Court involving mandatory presumptions have focused on instructions similar to the one in *Sandstrom*. In *Franklin*, for instance, this Court found unconstitutional "instructions stating that: (1) '[the] acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted' and (2) '[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.'" 471 U.S. at 309; *see also Carella v. California*, 491 U.S. 263 (1989) (considering instructions that intent to commit fraud and embezzlement were presumed after leased or rented

property was not returned within a certain number of days after return was demanded or a lease expired).

With this petition, the Petitioner has not specifically questioned the jury instruction given. Instead, the Petitioner has argued that the language of section 20-138.1 of the North Carolina General Statutes creates an unconstitutional presumption. In its opinion below, the North Carolina Court of Appeals clearly explained that the amendment to section 20-138.1 did not create a presumption of fact. *Narron*, 666 S.E.2d at 864-867. Instead, this statutory amendment established this issue as a matter of law, not of fact. As seen by this analysis, because no presumption of fact was created in this statute, no constitutional violation occurred.

The amendment to section 20-138.1 codified language that was an issue of a matter of law. As seen in the Court of Appeals' opinion, the court correctly found that this provision "simply states the standard for prima facie evidence of a defendant's alcohol concentration." *Narron*, 666 S.E.2d at 865. This new language, similar to the language previously found by the North Carolina Supreme Court in *Shuping* to be an appropriate statement of the law, did not create a legal presumption of a fact. *Narron*, 666 S.E.2d at 865-66 (citing *State v. Shuping*, 312 N.C. 421, 323 S.E.2d 350 (1984)). This provision did not create a legal presumption because "there is no 'presumption'

created with regards to some other element or factual issue." *Narron*, 666 S.E.2d at 866. In other words, this statute creates no presumption of any fact needed to be found by the jury based on the existence of another fact. Under this statute, the fact of the results of the defendant's chemical analysis are sufficient to prove a defendant's blood alcohol concentration. Simply stated, there is no presumption of a fact. *See generally*, *Koonce v. Pepe*, 99 F.3d 469, 473 (1st Cir. 1996) (no presumption created with the jury instruction given in a first degree murder case).

To give further clarification of why this amendment is not a presumption of fact, the N.C. Court of Appeals illustrated the difference. The court described how the amendment "does not state that 'results of a chemical analysis shall be deemed sufficient evidence to prove' e.g., a person's degree of intoxication, or his operation of a vehicle on a state highway." *Narron*, 666 S.E.2d at 866. If the amendment had allowed for an inference of a defendant's operation of a motor vehicle based on the results of his chemical analysis, a presumption of fact would have occurred. In such a case, the Petitioner's arguments as stated in this petition could be applicable. However, as seen in section 20-138.1(a)(2), such a presumption does not occur. The amendment to this statute only "codifies the common law threshold for prima facie evidence of a defendant's alcohol concentration." *Narron*, 666 S.E.2d at 866. *See*

generally, *State v. Kubik*, 456 N.W.2d 487, 501 (Neb. 1990); *State v. Brayman*, 751 P.2d 294, 297-300 (Wash. 1988).

The distinction between including language that dictates an issue of a matter of law versus language that creates a circumstance that a presumption of fact is utilized is critical. If the language dictates a matter of law and does not create a situation were facts are presumed, the Petitioner can neither show that his constitutional rights were violated nor that the lower court's opinion is in conflict with holdings of this Court. *State v. Corbett*, 168 N.C. App. 117, 607 S.E.2d 281 (2005) (the trial court instructed the jury that as a matter of law certain facts are sufficient to prove the element, specifically release to a safe place in a kidnaping case), *aff'd by*, 360 N.C. 287, 624 S.E.2d 625, *cert. denied*, 549 U.S. 993 (2006); *State v. Torain*, 316 N.C. 111, 123, 340 S.E.2d 465, 472, ("No 'presumption' is created when a trial judge fulfills his duty, where appropriate, as here, of declaring a weapon to be dangerous or deadly as a matter of law."), *cert. denied*, 479 U.S. 836 (1986). *State v. Locklear*, 331 N.C. 239, 245, 415 S.E.2d 726, 730 (1992) ("No presumption of any kind arose here where the trial court merely fulfilled its duty by explaining the well-established rule of substantive law known as the doctrine of transferred intent.") As seen by the language of section 20-138.1 and the opinion of the lower court, this statute did not create a situation where facts are

presumed. Because no presumption of fact was created by this statutory amendment, the Petitioner has failed to show error.

For decades, this Court has acknowledged that impaired driving is a scourge upon our Country and has long recognized the validity of alcohol testing. As this Court has ruled:

> [t]he test upheld here is not attacked on the ground of any basic deficiency or of injudicious application, but admittedly is a scientifically accurate method of detecting alcoholic content in the blood, thus furnishing an exact measure upon which to base a decision as to intoxication. Modern community living requires modern scientific methods of crime detection lest the public go unprotected. The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield. The States, through safety measures, modern scientific methods, and strict enforcement of traffic laws, are using all reasonable means to make automobile driving less dangerous

Breithaupt v. Abram, 352 U.S. 432, 439 (1957) (footnote omitted); *Perez v. Campbell*, 402 U.S. 637, 657 (1971) (Justice Blackmon concurring, "The

slaughter on the highways of this Nation exceeds the death toll of all our wars.")

In our country, per se laws were designed to be a separate method for convicting drinking drivers and are not evidence of or a presumption of impairment. Under the per se law, the sole issue is the amount of alcohol in a person which can only be determined by scientific tests. Because this amendment codifies a threshold and is not a presumption of fact, it is not in conflict with any of the cases cited by the Petitioner in his petition. Moreover, because the State was required to prove all elements beyond a reasonable doubt, and because the Petitioner had the ability to attack the credibility of the results of the chemical analysis, the Petitioner has failed to show a constitutional violation. Accordingly, there is no cause for the issuance of the petition.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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June 25, 2009

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No. 08-1363

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In The Supreme Court of the United States

JOHN ARTER NARRON, III,

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THE STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF NORTH CAROLINA

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Question Presented is:

DOES THE STATUTORY LANGUAGE "THE RESULTS OF A CHEMICAL ANALYSIS SHALL BE DEEMED SUFFICIENT EVIDENCE OF A PERSON'S ALCOHOL CONCENTRATION" CONSTITUTE A MANDATORY PRESUMPTION VIOLATIVE OF A PERSON'S DUE PROCESS RIGHTS SECURED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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ARGUMENT

From the beginning, Respondent's stated basis for finding the language of N.C.Gen.Stat. § 20-138.1(a)(2) constitutional urged a reading that no presumption exists because the scientific test result is not merely proof of the element but the element itself. The brief in opposition now abandons Respondent's previous arguments and forces further analysis of this Court's precedent.

I. The Relationship Of The Proven Fact To The Presumed Fact Is Not A Part Of this Court's Due Process Analysis Of Conclusive Presumptions In *Sandstrom*, *Francis*, Or *Carella*.

This Court's line of holdings since *County Court of Ulster v. Allen*, 442 U.S. 140 (1979), is straightforward: if the language of the presumption is irrebuttably mandatory or conclusive, it violates Fourteenth Amendment due process. Before *Ulster*, this Court evaluated all presumptions using the rational connection test, finding a due process violation only if the proven fact and the presumed fact bore no rational connection with each other in the run of cases. *See e.g.*, *United States v. Gainey*, 380 U.S. 63 (1965), *United States v. Romano*, 382 U.S. 136 (1965), and *Leary v. United States*, 395 U.S. 6 (1969). The constitutionality of legislation evaluated under this standard depended "upon the rationality of the connection between the facts proved and the ultimate fact presumed." *Romano* at 139.

The brief in opposition cites this Court's holding in *Sandstrom v. Montana*, 442 U.S. 510 (1979) as an application of this standard. It is true that *Sandstrom* contained a presumption which presumed intent upon other facts insufficient to prove intent, but the conclusive nature of the presumptive language was dispositive to this Court's ruling, as has been consistent since *Ulster*. To confute Respondent's assertions necessitates a focus on this Court's analysis following *Ulster*.

In Justice Stevens' opinion of the Court in *Ulster*, a line was drawn between permissive inferences and mandatory presumptions. A permissive inference "allows---but does not require--- the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one," and its validity depends "on the strength of the connection between the particular basic and elemental facts involved." *Id.* at 156-157. This Court then analyzed the "far more troublesome device" of the mandatory presumption, which "tells the trier that he or they must find the elemental fact upon proof of the basic fact." *Id.* at 157. Stating that the analysis of a mandatory presumption is "logically divorced from [the] facts," this Court held it "irrelevant in analyzing a mandatory presumption, but not in analyzing a purely permissive one, that there is ample evidence in the record other than the presumption to support a conviction." *Id.* at 159.

Following *Ulster*, in *Sandstrom*, this Court considered the following instruction: "the law presumes a person intends the ordinary consequences of his voluntary acts." The "threshold

inquiry" in the analysis was a determination of the nature of the presumption involved---permissive or mandatory. Because the jury "was not told that they had a choice, or that they might infer that conclusion," this Court found the instruction mandatory and not permissive. *Id.* at 514-515. This Court reasoned that the jury could have interpreted this "as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption" and therefore conclusive. *Id.* at 517.

The instruction in *Sandstrom* violated due process because it "invade[d] the factfinding function which in a criminal case the law assigns solely to the jury." *Id.* at 523. As Respondent argues, this Court did extend its analysis to say it was possible that the presumption permitted the jury to make an assumption which all the evidence considered together does not logically establish. It was, however, unambiguous that this was an *additional* way the instruction failed due process, not the sole reason. "Because *either* interpretation would have deprived defendant of his right to the due process of law," this Court held the presumption unconstitutional. *Id.* at 524 (emphasis added).

The import of this Court's analysis in *Sandstrom* and *Ulster* is the application of a tougher standard for due process analysis of mandatory presumptions, analyzing the presumption facially and not with regard to the particular facts or the connection between the evidence and the presumed fact. It is difficult to craft a more conclusive phrase than the present statute: "shall be deemed sufficient evidence of." It is, in Justice Brennan's words in

Francis, "cast in the language of command." Indeed, the court of appeals held, and Respondent does not urge differently, that this language is mandatory and not permissive.

Respondent references a defendant's opportunity to attack the credibility or admissibility of the breath test results at trial as a sufficient safeguard. This assertion is simply inaccurate. Due process can certainly find no sanctuary in foundational safeguards of evidentiary admissibility. There is no language in the statute nor the jury instructions allowing this presumption to disappear if a defendant presents some evidence showing the state's breath-testing machine to be fallible or inaccurate.

The brief in opposition cites two more holdings by this Court, *Francis*, *Supra*, and *Carella v. California*, 491 U.S. 263 (1989), as further support of Respondent's position that the strong connection between the proven fact and presumed fact eliminates constitutional concerns. Both cases are helpful in this analysis.

In *Francis*, this Court analyzed the following instruction: "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted." *Id.* at 309. Applying the standards of *Ulster* and *Sandstrom*, this Court again restated the bright-line distinction between mandatory presumptions and permissive inferences. In his opinion of the Court, Justice Brennan stated:

> An irrebuttable or conclusive presumption relieves the State of its burden of persuasion by removing the presumed element from the case entirely if the State proves the predicate facts . . . our cases make clear that such shifting of the burden of persuasion with respect to a fact which the State deems so important that is must be either proved or presumed is impermissible under the Due Process Clause.

Id. at 317. The analysis in *Francis* expends no deliberation to the relationship of the proven fact and the presumed fact. The presumption is mandatory, therefore it violates due process.

Respondent's reference to *Carella* provides another helpful example of this Court's analysis. In that case, the judge instructed that a person "shall be presumed to have embezzled" a vehicle if it is not returned within 5 days of the rental agreement's expiration date. The analysis was straightforward: "These mandatory directions directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offenses." *Id.* at 266.

In concluding that these presumptions ran afoul of due process, the holding in *Carella* does not rely on the connection between the proven and presumed facts. There is a mention of the connection of the proven and presumed facts in mentioning harmless error analysis, dicta which

doubtlessly led to the concurring opinion ("A defendant may assuredly insist upon observance of this [right to jury trial] even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State"). *Id.* at 268 (Justice Scalia, with whom Justice Brennan, Justice Marshall, and Justice Blackmun join, concurring).

This Court's rulings are lucid: mandatory presumptions that command the jury to find an elemental fact from a predicate fact impermissibly shift the burden of persuasion to a criminal defendant, which Fourteenth Amendment due process mandates must be borne by the prosecution. Such conclusive presumptions violate due process whether or not the proven fact is strong evidence of the presumed fact.

II. The Presumption In The Present Case Does Not Merely Codify A Matter Of Law For The Jury.

The brief in opposition claims a distinction between language that dictates an issue as a matter of law versus language that presumes a fact. As authority for this premise, Respondent cites three North Carolina appellate cases which uphold trial court instructions on legal issues. Without addressing the merits of any of the rulings cited, it is sufficient to say those create a distinction this Court never has, but which warrant no analysis in the present case. The presumption challenged in this case presumes a fact---alcohol concentration—which

is a core element of the offense, with proof of another fact---the state's admissible blood or breath test result.

One North Carolina case, *State v. Shuping*, 312 N.C. 421 (1984), has found a prominent place in Respondent's argument from the beginning. This is not coincidental, as the new statutory language was derived from that very ruling. *Shuping* was a defendant's challenge of the trial court's denial of a motion to dismiss an impaired driving charge (under 0.10 law, but with identical elements) after a 0.10 result was admitted into evidence. The supreme court held this sufficient evidence of a person's alcohol concentration for its submission to the jury. The standard in *Shuping* is evidence in the light most favorable to the state. It would be inappropriate and unconstitutional to instruct the jury at a stage of a trial where proof beyond a reasonable doubt is the standard with language of a lesser standard.

Respondent echoes the court of appeals' evasion of the core issue: the fact proven, the state's blood or breath test result, is separate and distinct from the element of actual alcohol concentration. The brief in opposition quotes the court's opinion, stating "the amendment does not state that 'results of a chemical analysis shall be deemed sufficient evidence to prove' e.g., a person's degree of intoxication, or his operation of a vehicle on a state highway." *State v. Narron*, 666 S.E.2d 860 at 866 (2008). The court could have answered its own question by continuing with the language of the statute, rather than replacing it with exempli gratia.

"Alcohol concentration" is the presumed fact---the element.

Respondent is correct that the only way to determine an individual's alcohol concentration is by scientific testing. Without a presumption, this still remains strong evidence of the element. But the weight, reliability, and certititude with which to assign the rest result in each individual defendant's case must remain with the factfinder, not the legislature.

The court of appeals correctly stated that the legislature has the proper authority restrict the specific amount of alcohol a driver can have in their system while driving on the streets and highways of North Carolina. The court effervesces over the North Carolina "legislature's recognition of this reliable and accurate innovation of blood alcohol concentration testing." Undeniably, North Carolina's General Assembly has the authority to determine what scientific testing is accurate or reliable enough for admissibility at trial. But it does not follow that the same power extends to enactment of legislation that dictates the factual findings of a jury.

In straining to find due process conformity, the court concluded "the meaning of the phrase 'shall be deemed sufficient evidence to prove' is that properly admitted results of a chemical analysis 'must be treated as prima facie evidence of a defendant's alcohol concentration." *Narron* at 865. This Court has never applied a prima facie standard to either a conclusive presumption or a permissive

inference. Such analysis was flawed and must be corrected.

III. Because The Statute Is Applied At The First Tier Trial Court Where Most Driving While Impaired Offenses Achieve Resolution, Both The Statutory Language And The Jury Instruction Derived Therefrom Must Be Addressed.

Respondent's attempt to divorce the jury instruction from the statute by claiming the jury instruction was not addressed in the Petition warrants discussion. Petitioner's objections at trial and assignment of errors at the appellate level--as well as the current petition before this Court--focus on both the jury instructions and the statutory language. The instructions, cited in the petition on pages 5-6, follow this statutory language verbatim, replacing only the word "shall" with "are." The procedures governing the disposition of impaired driving charges in North Carolina courts necessitates the issue turning on the statutory language as well as the jury instruction.

North Carolina's driving while impaired offense in is a misdemeanor, punishable by up to a maximum of two years in prison. In North Carolina, pursuant to N.C.Gen.Stat. § 7A-272, the District Court Division has original jurisdiction for the trial of all criminal actions below the grade of felony. A District Court Judge is the factfinder, sitting in place of a jury. A defendant has the right to appeal to Superior Court for a jury trial de novo pursuant to N.C.Gen.Stat. § 7A-290.

This Court has previously held Fourteenth Amendment due process protections extend to first tier state trial courts. In *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972), the issue was whether the Fourteenth Amendment due process right to an impartial judge extended to Mayor's Court, where all traffic infractions were heard. This Court ruled that due process guarantees extend to such first-tier state courts created by statute, and the "procedural safeguard" of a trial de novo "does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal." *Id.* at 60. While the District Court is not a court of record, and defendant assigned error to the jury instructions on appeal, the statute itself must be addressed or defendants will be forced to appeal for de novo trials before Fourteenth Amendment due process protections will apply.

IV. Respondent's Initial Argument At The Trial Court And The Court Of Appeals Reveals The Purpose Of This Legislation And The Intended Interpretation By North Carolina Courts.

The brief in opposition marks a clear departure from Respondent's argument in state court, which asserted that the test result was not merely proof of the element but the element itself. As Respondent is seeking no further review of the

North Carolina Court of Appeals ruling in this case, and as it reveals Respondent's intended reading by our state courts of the new statute, a brief exploration of the North Carolina Attorney General's previous argument before that court is warranted.

Respondent's previous theory continued as subtle variations on an unchanging theme that the scientific test is dispositive for a conviction of impaired driving. Initially at the trial court level, counsel for Respondent admitted that the legislature, through this new statute, intended the jury not be necessary for this element of the offense.[1]

Respondent's position was just as straightforward in the brief filed with the North Carolina Court of Appeals by Isaac Avery, III, a co-author of the DWI task force legislation that became the new statute. At that time, Respondent argued that that there is not both a predicate fact and a presumed fact because "The Intoxilyzer result IS

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[1] Arguing on behalf of the Attorney General at the February 12, 2007 hearing in Pitt County Superior Court, Attorney Isaac Avery, III, argued that the North Carolina General Assembly said "when it is a .08 and it comes in [to evidence], you're guilty of that part of the offense." When asked by the Superior Court Judge presiding, "Well what's the need to have a jury trial then?" Mr. Avery responded, "Well, because you still have to prove the other elements." *Transcript of Proceedings taken in Pitt County Superior Court*, February 12, 2007. Karen M. Nethercutt, CVR.

THE ELEMENT" (emphasis included).[2] In a most revealing statement, Respondent argued the jury "cannot find an alcohol concentration was less than a 0.08 when a 0.08 is the only result shown by a valid test." *Brief for the State, North Carolina Court of Appeals,* No. COA08-129, p. 18, filed May 7, 2008.

The addition of this single sentence into the subsection defining the fourth element of driving while impaired was not for the education of a legal standard but to command the factfinder that they must follow the results of the prosecution's scientific evidence. Under the previous version of this statute, with identical elements but without the presumptive language, some judges and juries were occasionally not convinced beyond a reasonable doubt in the infallibility of the state's breath-testing machine or the methods used by the S.B.I. lab in its blood testing analysis. The "Governor's DWI Task Force" perceived this as a problem not to resolve in updating or improving the method of scientific testing but in legislation dictating convictions. Thus, the impaired driving statute was amended to

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[2] The relevant portion of the brief filed by the Attorney General reads as follows: "The General Assembly has authorized extensive public resources to assure that scientific tests using breath or blood are accurate. The Legislature did not preclude the Defednant from attacking the State's test. The Defendant can challenge its admissibility. The Defendant can also, by statute, obtain his own test. All the legislature did was to say that the amount of alcohol in a driver's system must be shown by a chemical analysis and not by improper inferences. When the Intoxilyzer result is 0.08, there is no fact presumed to prove the element. The Intoxilyzer result IS THE ELEMENT." *Brief for the State, No. COA08-129,* p. 16, filed May 7, 2008 (emphasis included in original as set out).

its present form, which constitutes an invasion by North Carolina's legislature into the sanctity of the jury.

Trial courts are instructing juries across North Carolina that the test results offered into evidence by the prosecution "are deemed sufficient to prove" the element of alcohol concentration. Juries are granted no permission to differ or disagree. This is a structural violation of Fourteenth Amendment due process. A mandatory presumption of this nature and due process cannot coexist. The issue of whether constitutional protections will remain insulated from legislative temptations to replace juries with favored scientific evidence is the concern of this case and must be addressed by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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